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SERIOUS FRAUD
Investigation and Trial

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Serious fraud: investigation and trial

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Foreword by the Honourable Mr Justice Henry

The indications are that serious fraud is on the increase. We have to be able to deal with it: to deter it, to detect it, and to punish it. Our criminal justice system must play its proper part in this. It must be fair but inevitable. It must be more powerful than the most powerful. It must be effective in convicting the guilty and acquitting both the innocent and those not proved to be guilty. The trials leading to these verdicts must be manageable (for if not manageable, fairness is threatened), and must not be wasteful either of time or of money. That specification is what we require of the system.

The complexities (real and simulated) of serious fraud make that a testing specification for an adversarial criminal justice system which evolved in an oral tradition, memory-based, with short trials and no documents, and in which protections designed for the vulnerable, the weak and the suggestible (into which categories those accused of serious fraud tend not to fall) were extended to all accused. So it is not surprising that serious fraud is today near the limit of criminal jurisprudence, where there is the risk that a system designed for very different trials may be tested to destruction.

Against that background, I welcome this work as a timely book on an important subject by authors with considerable practical experience in the field. It is the more valuable for being a book written by practitioners for practitioners, and the busy reader will find material there not otherwise as easily or as conveniently accessible.

The book usefully examines the history of the legislative changes that have led to the trial of serious fraud being treated in many respects as 'a free-standing system, separate from but within the criminal justice system'. It emphasises the fact that Parliament, faced with the problem of successfully dealing with serious fraud, has introduced an important inquisitorial element into the investigation and proof of fraud.

As to further reform (which I believe to be necessary) the authors rightly ask the rhetorical question as to whether it is right that what they describe (but do not define) as the 'fundamental articles of faith' of the criminal justice system should not apply in a small number of important cases. But it should not be assumed that the old tenets are fixed and immutable. It is anticipated that Lord Runciman's Royal Commission will examine them both in the general criminal justice context, and in the particular serious fraud context. It is said that most British battles were fought on the join of two maps. With the Runciman Commission report and any legislative changes that follow it, it may be that both the criminal justice system and that part of it dealing with serious fraud will see significant changes requiring the redrawing

of the maps on which this book is based. I look forward to seeing those changes, and to seeing them set out and commented on in the second edition of this book.

Preface

The genesis of this book was an internal office exercise to gather together in one place all the relevant statutory and other materials relating to fraud. Although much of this material was relatively easily available, the sources were widely scattered. The exercise prompted us to think that what was useful to us may be useful to a wide range of practitioners and advisers in the field of serious fraud, and that in addition to the primary and secondary legislation, Practice Directions and other published material, a commentary on this new and distinct area of criminal law practice would be appreciated.

The main purpose of the book, therefore, was originally to provide ready access to materials. In the course of preparing the book for publication, however, the commentary has assumed a greater significance than we had originally envisaged. In the event, we hope that the balance between the two parts of the book will prove useful to practitioners and advisers, as well as those who are confronted by the ever-increasing menace of fraud in business throughout the UK.

One difficulty we have encountered has been to decide what subject matter falls within our remit. Since the book is about serious fraud, and particularly those frauds to which the Criminal Justice Act 1987 relates, we have not thought it appropriate to deal in any detail with the full range of fraud investigations. We have nevertheless included a chapter on 'Other fraud inquiries' (Chapter 5) where the powers of the police, the Inland Revenue and Customs and Excise are outlined. We considered examining the powers of investigation of Self-Regulatory Organisations, but rejected the idea on the ground that they do not, directly, lead to criminal trials. Investigations by the European Commission and the question of EC fraud in general have also been omitted, although this is a rapidly expanding area of practice. However, there is a chapter dealing with 'Cross-border issues' (Chapter 9) which extensively examines jurisdictional problems.

Another area we have not tackled is that of 'fraud offences'. We considered that the large number of well established works on the Theft Acts obviated the need for such an exercise. A chapter on 'Conspiracy to defraud' (Chapter 6) has been included though, because of its direct relevance to serious fraud cases.

The law is stated as at 1 May 1992. Two important decisions have been reported since then. First the decision of the House of Lords in *R v Director of Serious Fraud Office, ex p Smith* (1992) 3 WLR 66, which we have managed to incorporate into the text. Second, that of the Court of Appeal in *R v Cohen and Others* (1992) Times, 29 July ('The Blue Arrow Case') and the subsequent discontinuance of *Blue Arrow II* by Brooke J on 3 August 1992, could not be incorporated in the text. The Court of Appeal judgment was mainly concerned

with the issue of long trials, and in quashing the convictions of the four defendants in the *Blue Arrow* trial who had been convicted, Mann LJ referred to the year-long trial as a 'costly disaster'. The Court of Appeal emphasised again the need to avoid overloading indictments, and they recommended the early use of a judge's powers of severance so as to create two or more short and manageable trials in place of one long trial. The encouragement by the Court of Appeal to judges to enter the arena in a more robust manner than some have felt able to do is welcome, as is the encouragement to the Serious Fraud Office, and other prosecutors, to restrict indictments to the core issues. George Staple, the Director of the Serious Fraud Office, has stated that he is alive to these problems, and that his office has to try to make cases simple and comprehensible to a jury (*Sunday Times*, 23 August 1992). Warnings of this nature, however, have frequently been given by the Court of Appeal in the past (see page 90 below), and they do not seem to be heeded for long. It remains to be seen whether the drastic step of quashing the convictions of four defendants largely on the grounds of length and complexity of trial will serve as a more salutary lesson to those who have to deal with these very difficult cases in the future.

In writing this book we have had assistance from a variety of sources. We would particularly like to thank our consultant editor, Dr Tony Smith, for his enthusiastic and helpful assessment of our progress, and for his encouragement. Jeraine Olsen, formerly an Assistant Director of the Serious Fraud Office, read parts of the manuscript and made valuable comments. Her contribution is very greatly appreciated. Even though much of the material in this book covers new ground, some of the subject matter has inevitably been considered in other works. We hope we have acknowledged in the appropriate places any assistance we have derived from them.

Finally, of course, the writing of a book on top of conducting a busy practice creates extra work for others. We are especially grateful to our secretaries, Serena Nathan and Christine Winyard, for so accurately and uncomplainingly typing (and re-typing) the manuscript. To our families, also, who have been deprived of our company for long periods, we owe the greatest debt of all.

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AJJ Woodcock

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